No. 90-1552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHEVRON CORPORATION, *et al.*,
Petitioners,

v.

STATE OF ARIZONA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the Chamber of Commerce of the United States of America ("the Chamber") and the National Association of Manufacturers of the United States of America ("NAM") hereby move for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari. The Petitioners have consented to the filing of the brief. The Respondents have denied consent.*

1. The Chamber of Commerce of the United States of America (the "Chamber") is the largest federation of business companies and associations in the world. The Chamber represents nearly 180,000 businesses and organizations, with substantial membership in each of the 50 states, and serves as the principal voice of the Amer-

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* *See* attached letters.

ican business community. Eighty-nine percent of the Chamber's members (approximately 160,000) are small businesses with 49 or fewer employees. The vast majority of its members conduct interstate commerce and are subject to the federal antitrust laws. The Chamber has a strong interest in cases such as this, which threaten the way business is conducted across the nation. The holding of the Ninth Circuit, if allowed to stand, will have a substantial and potentially anticompetitive impact on the manner in which the Chamber's members make pricing decisions.

2. The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of approximately 12,500 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. The members of NAM and these councils are vitally interested in restrictions on their ability to announce the prices of their products.

3. Pursuant to Rule 37.1 of the Rules of the Court, the Chamber and NAM move to file their brief *amicus curiae* to bring "relevant matter[s] to the attention of the Court that [have] not already been brought to its attention by the parties" that strongly support exercise of the Court's jurisdiction. Our brief highlights the following issues, in addition to the matters addressed in detail in the Petition.

4. First, our brief argues that what the Ninth Circuit labels in its decision "interdependence" is the very essence of the competitive process—the essential interaction through which the law of supply and demand forces prices to adjust to relative scarcity and oversupply. Both as a matter of policy and to preserve the ordinary and proper business practices of its members, the *amici* oppose any

effort to confuse "interdependence" with collusion. This essential difference between lawful interdependence and unlawful collusion must be preserved (defined by this Court as a "conscious commitment to a common scheme designed to achieve an unlawful objective").

5. Second, our brief argues that the use of circumstantial evidence to establish a "conscious commitment to a common scheme" must be viewed with great skepticism because the powerful pressure on business people to meet competition often makes observed pricing patterns in intensely competitive markets as tightly bunched as pricing patterns in theoretically collusive markets. The Chamber's and NAM's small business members, whose pricing must almost always be "at market," are peculiarly vulnerable to such dualistic interpretations of pricing behavior. For this reason, the Chamber and NAM firmly support the teaching of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986) that observed conduct which can be equally explained by competitive interaction or collusion is simply not probative on the issue of "conscious commitment."

6. Finally, our brief demonstrates how the Ninth Circuit's decision, if not reversed, will create grave risks for businessmen who collect, disseminate and/or permit dissemination of pricing information to facilitate unilateral pricing decisions. Unless a trial court acting under that decision determines that price dissemination is significantly procompetitive (whatever that vague new standard means) in a particular market, observed price dissemination itself would block summary judgment on price-fixing charges and permit a jury to infer both a "conscious commitment to a common scheme" of price exchange and a consequent price-fixing agreement. The consequences will be both widespread, unfair and punitive labelling of avid competitors as price fixers and a severe chilling effect on the accumulation of competitive intelligence. It is essen-

tial to preserve the distinction between unlawful collusion and the inevitable, welfare-maximizing, interdependence of unilateral decisionmaking in competitive markets.

In order to bring these matters to the attention of the Court, the Chamber and NAM respectfully move for leave to file the attached brief in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
ARGUMENT	3
I. THE NINTH CIRCUIT'S OPINION IS A RADICAL DEPARTURE FROM *MONSANTO* AND *MATSUSHITA* SINCE THE EVIDENCE WAS AT LEAST AS PROBATIVE OF UNILATERAL PRICING DECISIONS AS IT WAS OF COLLUSIVE BEHAVIOR	3
II. PRICE DISSEMINATION IS AS ESSENTIAL TO UNILATERAL PRICING DECISIONS BY SELLERS AS IT IS TO UNILATERAL CONSUMER CHOICE	6
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946) 8

Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574 (1986) ..... *passim*

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) ..... *passim*

State of Arizona v. Standard Oil Co. of California, 906 F.2d 432 (9th Cir. 1990) 2

United States v. Container Corp. of America, 393 U.S. 333 (1969) 6

Statutes:

Sherman Antitrust Act § 1, 15 U.S.C. § 1 2

Articles:

DeSanti and Kovacic, *Matsushita: Its Construction and Application by the Lower Courts*, 59 Antitrust L.J. 609, 628 4

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST OF THE AMICI CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of businesses and associations in the world. The Chamber represents nearly 180,000 businesses and organizations, with substantial membership in each of the 50 states, and serves as the principal voice of the American business community. Eighty-nine percent of the Chamber's members (approximately 160,000) are small businesses with 49 or fewer employees.

The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of approximately 12,500 companies and

subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council.

The Chamber and NAM are greatly concerned that the Ninth Circuit has created a summary judgment standard in Sherman Act Section 1 cases [1] founded on circumstantial evidence that will greatly restrict, if not completely prohibit, heretofore legitimate business conduct.[2] The decision will have a negative impact on Chamber and NAM members of all sizes, not just the large oil companies directly involved. The decision threatens the availability of summary judgment in situations where it should clearly be available and deters procompetitive business practices which have previously been recognized as essential to the orderly functioning of free markets. In those instances when the alleged conspiratorial practice is a matter of economic necessity, Chamber and NAM members will be subject to treble damages for conduct which the marketplace demands of them.

Price competition between businesses, the virtual hallmark of a free economy, will be seriously impaired. Under the Ninth Circuit's ruling, a plaintiff will need only to produce evidence of interdependent pricing by two or more businesses, coupled with public pricing announcements, to bring a credible lawsuit, even though this Court has always held that interdependent pricing alone is not enough to base a finding of a Section 1 violation. Regardless of the legitimacy of the claim, businesses of all sizes will be faced with increased litigation exposure, and the courts will be burdened by many more cases. The Ninth Circuit seems determined to rewrite the law on summary judgment in antitrust suits.

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[1] 15 U.S.C. § 1.

[2] *State of Arizona v. Standard Oil Co. of California*, 906 F.2d 432 (9th Cir. 1990).

The Ninth Circuit declares the basis of its ruling to be *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), yet the decision is a radical departure from those cases. In marked contrast, no other court of appeals has adopted such a restrictive view of when summary judgment is properly granted.

The plaintiffs' primary allegation in this case is that the defendants engaged in a conspiracy to fix prices, and their main evidence of this is interdependent pricing. This brief illustrates the imbalances the new standard will create in the arena of price competition between small businesses, using the same type of evidence in the illustration that the plaintiffs have asserted in the case.

ARGUMENT

I. THE NINTH CIRCUIT'S OPINION IS A RADICAL DEPARTURE FROM *MONSANTO* AND *MATSUSHITA* SINCE THE EVIDENCE WAS AT LEAST AS PROBATIVE OF UNILATERAL PRICING DECISIONS AS IT WAS OF COLLUSIVE BEHAVIOR.

The Chamber and NAM are firm believers in the unconstrained operation of free markets and thus support the antitrust laws and oppose price collusion. At the same time, the Chamber and NAM recognize that in a free market economy their members must take account of each other's competitive conduct, including competitive pricing, in deciding how rationally to conduct their business affairs. Indeed, as this Court has often held, the boundaries of a competitive market are defined by cross-elasticities of supply and demand—*i.e.*, the degree to which buyers and sellers respond to each other's actions. Thus, what the Ninth Circuit labels in its decision "interdependence" is the very essence of the competitive process —the essential interaction through which the law of supply and demand forces prices to adjust to relative scarcity and oversupply. Both as a matter of policy and to pre-

serve the ordinary and proper business practices of its members, the Chamber and NAM oppose any effort to confuse "interdependence" with collusion. This essential difference between lawful interdependence and unlawful collusion (defined by this Court as a "conscious commitment to a common scheme designed to achieve an unlawful objective"[3]) must be preserved. The Ninth Circuit undermines this definition by allowing mere interdependence to be collusion.

The use of circumstantial evidence consisting of legally ambiguous or perfectly lawful conduct to establish a "conscious commitment to a common scheme" must be viewed with great skepticism because without such practices most markets don't work. The Chamber's and NAM's small business members, whose pricing must almost always be "at market," are peculiarly vulnerable to such dualistic interpretations of pricing behavior. For this reason, the *amici* firmly support the teaching of *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Matsushita Elec. Industrial Co.* v. *Zenith Radio*, 475 U.S. 574 (1986) that observed conduct which can be equally explained by competitive interaction or collusion is simply not probative on the issue of "conscious commitment."

The Ninth Circuit has departed radically from *Monsanto* and *Matsushita*, and a whole line of cases allowing parallel pricing, by treating non-probative conduct, such as parallel pricing and unilateral publication of pricing actions, as permitting an inference of collusion.[4] Paying lip service to *Monsanto* and *Matsushita*, the Ninth Circuit would foreclose that inference from blocking summary

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[3] *Monsanto*, 465 U.S. at 764.

[4] "This Ninth Circuit reading of *Matsushita* conflicts with other circuits' opinions applying *Matsushita*, as well as with earlier Ninth Circuit opinions requiring only that the defendant prove plausible, independent business justifications for its conduct." DeSanti and Kovacic, *Matsushita: Its Construction and Application by the Lower Courts*, 59 Antitrust L.J. 609, 628.

judgment only where the Court believes the observed behavior at issue to be significantly procompetitive, whatever that vague new standard means.[5] In all other circumstances, the Ninth Circuit would permit a plaintiff to put collusion allegations before a jury even where the observed evidence relied upon could be equally explained by competitive interaction or collusion.

On the specific facts presented below, the Ninth Circuit held that parallel pricing itself could defeat summary judgment if the Court determined the market to be less than necessarily interdependent. Finding interdependence to be appropriate in the wholesale gasoline market at issue, however, the Ninth Circuit went on to rest its denial of summary judgment on observed "price dissemination" practices which: (1) could be explained equally by collusion or by the parallel, but unilateral, interest of the petitioners involved in facilitating the acquisition of market intelligence; (2) were determined by the Court, *de novo*, to be not significantly procompetitive; and (3) were further determined by the Court to support the highly questionable double inference: (a) that collusive price exchanges were in place, (b) for the purpose of supporting a "conscious commitment to a common scheme" to fix prices.

Petitioners have fully explained the Ninth Circuit's deviation from: the teaching of *Monsanto* and *Matsushita*; the sounder interpretation of that guidance by other circuits; and the relevant principles of antitrust law and evidence. The Chamber and NAM concur in that analysis and need not repeat it. However, the Chamber and NAM would like to draw the Court's attention to their particular

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[5] Apparently, in the context of the present case, the unilateral publication of price information and conscious parallel pricing within an industry are presumptively lawful as long as prices are falling, but give rise to an inference of unlawful collusion whenever industry prices rise. A "free market" necessarily assumes prices can move up or down, in response to supply and demand.

concern with the Ninth Circuit's misplaced focus on price dissemination and with the potential for abuse of the Ninth Circuit's standard to unfairly pressure small businesses and to stifle meaningful price competition. In addition to the error in the Ninth Circuit's analysis of this Court's teaching and its consequent weakening of the salutary principles of *Monsanto* and *Matsushita*, these factors clearly support a grant of *certiorari* to avoid widespread adverse impacts on Chamber and NAM members.

II. PRICE DISSEMINATION IS AS ESSENTIAL TO UNILATERAL PRICING DECISIONS BY SELLERS AS IT IS TO UNILATERAL CONSUMER CHOICE.

The Ninth Circuit, perhaps confused by this Court's decision in *United States v. Container Corp. of America*, 393 U.S. 333 (1969), which arose in the special circumstances of an individually quoted market where secrecy was a competitive weapon, viewed "price dissemination" with great suspicion. As practical business people, however, Chamber and NAM members recognize that market information is as essential to unilateral pricing decisions by sellers as it is to unilateral consumer choice. A business person who is slow to acquire competitive pricing information will inadequately protect his sales base and or his revenue base and may find it hard to survive in a competitive market. Thus, even the most fiercely competitive business person may find it in his unilateral self interest not to disturb custom and usage—for example, price postings or trade press reporting—which rapidly disseminate pricing intelligence. Moreover, business people are highly unlikely to take affirmative action to foreclose dissemination by their customers or intermediaries like brokers who routinely acquire price lists. Indeed, as a practical matter, business people will often determine unilaterally that the benefits of information acquisition in an "open market" outweigh the costs of sacrificing the temporary secrecy of their own pricing initiatives. Par-

ticularly where, as in this case, retail sales make wholesale price changes known to the trade in a relatively short time, the competitive benefits of temporary secrecy appear very limited relative to the advantages of an open market in reaching unilateral pricing decisions.

The Ninth Circuit's decision, if not reversed, will create grave risks for businessmen and women who collect, disseminate and/or permit dissemination of pricing information to facilitate unilateral pricing decisions. Unless a trial court acting under that decision determines that price dissemination is significantly procompetitive in a particular market, observed price dissemination itself would block summary judgment on price-fixing charges and permit a jury to infer both a "conscious commitment to a common scheme" of price exchange and a consequent price-fixing agreement. The consequences will be both widespread, unfair and punitive labelling of avid competitors as price fixers and a severe chilling effect on the accumulation of competitive intelligence resulting in markets which sluggishly and inefficiently respond to competitive initiatives. Consumers, as well as Chamber and NAM members, can only be harmed in the process.

The pernicious, and essentially irrational, character of the Ninth Circuit's analysis can be illustrated by considering two competing lumber suppliers in each of two small towns who post lumber prices on their doors. In the first town, both suppliers deal exclusively with contractors with whom they have historic ties, a situation reinforced by their location at opposite ends of town. In the second town, both suppliers have exclusive and non-exclusive customers and occupy relatively contiguous locations. In both towns, however, contractors compete with each other for all jobs with lumber cost a key factor so that the lumber suppliers are sensitive to each other's pricing.

Using the Ninth Circuit's analysis, posting in the first town could be determined not to be a significantly pro-

competitive activity since contractors do not comparison shop. Thus, posting activity—particularly combined with the parallel pricing necessary to preserve contractor relations with lumber suppliers—would establish a jury case of price fixing. Posting in the second town, however, would likely be determined to be significantly procompetitive because it facilitates shopping by non-exclusive contractors. Thus, the same posting and parallel pricing activity in the second town would not be deemed sufficient to establish a jury case of price fixing despite the fact that the potential impact of market intelligence on the actions of the lumber suppliers would be the same in both towns. Even assuming that sophisticated lawyers, economists and judges could understand and accept these differing results, Chamber and NAM members and consumers will inevitably find them contrary to common sense and reasonable business conduct. The result will be an inevitable deterioration of respect for the antitrust laws coupled with a systematic effort—by those fortunate enough to avoid the inevitable trap for the unwary or uncounselled—to operate on a market intelligence-blind basis with a clear reduction of the efficiency that antitrust is intended to promote.

Chamber and NAM members are particularly sensitive to aberrational interpretations of the antitrust laws relating to price fixing because they can, as illustrated above, distort the central nervous system of competitive markets and because they also threaten grave and unfair consequences for innocent sellers. The threat of massive treble damages based on speculative analysis under the *Bigelow* rule,[6] the imposition of attorneys fees in addition to damages and the moral opprobrium of a price fixer label put a powerful litigating tool into the hands of plaintiff's counsel. Faced with the cost and uncertainty of a jury trial on circumstantial evidence, business people —particularly small business people—may be bullied into

[6] *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946).

totally unfair settlements simply because they sought competitive intelligence. The teaching of *Monsanto* and *Matsushita* avoided this *in terrorem* effect by giving the courts power to stop such inferential exercises at the threshold. The Ninth Circuit's decision, unless reversed, will undo that comfort, send chills throughout the small business community, and erect a "regulatory" barrier to the flow of price information which is the lifeblood of a competitive and efficient market.

CONCLUSION

For the reasons stated above, the Court should grant the Petition for Certiorari, and reverse and remand the decision of the Ninth Circuit.

Respectfully submitted,

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